In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1040

W. B. PARKER, Director of Agriculture, AGRICULTURAL PRORATE ADVISORY COMMISSION; RAISIN PRORATION ZONE No. 1, PROGRAM COMMITTEE, W. B. PARKER, IRA REDFERN, LYMAN LANTZE, JAMES LANGFORD, MARK G. JOHNSON, C. M. BROWN, WM. F. DARSIE, DR. DEAN MCHENRY, PRESTON MCKINNEY, H. C. ANDERSON, A. K. KELLY, RENALD MASTROFINI, ALEX BERG, MESROB MIRIGIAN, MELCHIOR HANSEN, A. L. DAVIDSON, W. J. CECIL and J. C. HARLAN,

Appellants,

vs.

PORTER L. BROWN,

Appellee.

Brief of Appellee

~~DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED.~~

CHRISTIAN M. OZIAS,
Brix Building, Fresno, California,
G. L. AYNESWORTH,
IRVINE P. ATEN,
RICHARD V. ATEN,
Helm Building, Fresno, California,
WILLIAM M. MILES,
Brix Building, Fresno, California,
Attorneys for Appellee.

Subject Index

Table of Authorities Cited

Codes and Statutes

Miscellaneous

STATEMENT OF THE CASE.

Appellee (plaintiff in the District Court) has not yet received appellants' brief. We wish, therefore, affirmatively to show wherein the record supports the decision of the trial court. In this connection, Rule 52 (a) of Rules of Civil Procedure for the District Courts of the United States provides in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

(a) THE DISTRICT COURT HAD JURISDICTION.

The law generally applicable to this phase of the case has been stated by this court as follows:

> "Whether a state statute is regulatory or prohibitory, when a bill is filed against its enforcement under section 266 of the Judicial Code, the matter in controversy is the right to carry on business free of the regulation or prohibition of the statute. Where the statute is regulatory the value of the right to carry on the business, as was said in McNutt v. General Motors Acceptance Corporation, supra, may be shown by evidence of the loss that would follow the enforcement of the statute. And this loss may be something other than the difference between the net profit free of regulation and the net profit subject to regulation. * * * The value of the matter in controversy may be at least as accurately shown by proving the additional cost of complying with the regulation."
>
> (*Buck v. Gallagher*, 307 U. S. 95, 100, 59 S. Ct. 740, 742.)

The trial court in the case at bar found (R. 52):

"That the State of California, through its duly authorized officers, is attempting to enforce the provisions of a proration program for raisins (hereinafter sometimes called the program) prescribed under the authority of the California Agricultural Prorate Act (Chapter 754, California Statutes 1933), as amended (hereinafter sometimes called the Act), and is claiming penalties in the amount of $13,000.00 against the plaintiff; that the plaintiff, since the commencement of the raisin crop season of the year 1939, has been and is now engaged in the business of producing, buying, packing and selling sun-dried raisins produced in said zone, including raisins produced in the crop year 1940; that the plaintiff on September 7, 1940, had orders for the delivery of sun-dried raisins produced in said zone in the year 1940 which he could not fill without complying with the seasonal program for raisins hereinafter referred to, and that defendants in enforcing said program have directly interfered with and obstructed plaintiff's said business and thereby damaged the plaintiff in a sum in excess of $3,000.00, exclusive of interest and costs, and that the matter in controversy herein exceeds, exclusive of interest and costs, the sum of $3,000.00."

Appellee testified that the prorate enforcement officials were maintaining against him in a State court actions for civil penalties, amounting to $13,000.00, for violations of the prorate program. (R. 138.) Accrued penalties constitute "matter in controversy". *Healy v. Ratta*, 292 U. S. 263, 54 S. Ct. 700.

The prorate program went into effect September 7, 1940. (R. 18.) In May, 1940, appellee, as a packer,

had entered into contracts for the sale of 762½ tons of raisins at $60.00 per ton. (R. 74.) Appellee produced 200 tons on his own ranch, leaving 562½ tons which he had to purchase in the open market to fill these contracts. (R. 76.) The market price of raisins to the packer was $45.00 per ton immediately preceding the adoption of the prorate program. (R. 76.) Immediately after that date the price jumped to $55.00 per ton, an increase of $10.00 per ton. (R. 76.) That this increase was caused by the prorate is shown by a Proration Program Bulletin issued February 8, 1941 by the Zone, which stated that if it had not been for the program, the price would have been "not over $40.00 per ton". (Plaintiff's Exhibit 5, R. 75.) Therefore, at the time of the filing of this action, appellee was faced with a loss of $10.00 per ton on 562½ tons, or a total of $5625.00.

Appellee testified that under the program the cost of buying raisins increased $1.50 per ton. (R. 78.) This was true of the cost to all the packers. (R. 101.) On the basis of his experience in the raisin business and the fact that he had sold 2000 tons during the year 1939, appellee anticipated a business of 3000 tons during the year 1940. (R. 78-79.) Operating under the program, it would have cost him $4500.00 more to buy these 3000 tons of raisins than it would have cost if the program had not been in effect.

Appellee plead that his rate of profit per ton of raisins shipped was from $5.00 to $12.00. (R. 4.) Apparently there is no evidence on that subject in the record. However, it is sufficient under the rule stated

in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U. S. 283, 288, 58 S. Ct. 586, 590, that the damage in good faith be claimed. Appellee in fact was able to purchase at various times in violation of the program a total of 700 tons of raisins (R. 92), in addition to the 200 tons which he produced. He, however, lost a minimum of $5.00 per ton profit on 2100 tons anticipated business, or $10,500.00.

We respectfully submit, therefore, that the jurisdiction of the District Court was established.

(b) THE PRORATE DIRECTLY OBSTRUCTED APPELLEE'S INTERSTATE BUSINESS.

The trial court found (R. 59):

> "That plaintiff as a packer contracts for delivery of a very large percentage of the raisins he handles directly into interstate and foreign commerce; that plaintiff on September 7, 1940, had substantial orders for out of state delivery of raisins which he could not fill by purchase of 'free tonnage' and could not fill at all because of said pools without complying with said program; that defendants in enforcing said program have directly and substantially interfered with and obstructed plaintiff's said business and have directly and substantially burdened interstate and foreign commerce."

In Report No. 134, 2d Series, of the U. S. Tariff Commission, entitled: "Grapes, Raisins and Wines", published in 1939, the following appears at page 142:

"Commercial production of raisins in the United States is confined to California. There has been a small production in Arizona, New Mexico, and Utah but it has been too insignificant to be recognized by the trade, and statistics of production are not available. In California the industry is located in the upper San Joaquin Valley, in the central part of the state, principally in Fresno County, but spreads into Tulare, Kings, Madera, and other adjoining counties."

The extent of the raisin business is illustrated by the business of Sun Maid Raisin Growers, one of the large packers. This concern operates through more than 100 brokers in the United States, and in peace times it has four brokers abroad and a London subsidiary which handles the business in Europe. (R. 118.)

The fact stipulation entered into by the parties read in part as follows (R. 16):

"9. When such raisins are so prepared for commercial sale and delivery, the packer delivers the same to jobbers, wholesalers, brokers, distributors, and dealers for resale and distribution to the public. Such raisins are ultimately consumed both within and without the State of California, but 90-95% of the raisins consumed as raisins, and for human consumption are ultimately consumed outside of the State of California."

Counsel for appellants conceded that the raisins handled by appellee took the same course. (R. 80-81.)

Appellee testified that he ships 90% of the raisins handled by him out of the state and that the same is true of the other packers. (R. 154-155.) His contracts call for shipment f.o.b. Kerman, California, which is where his plant is located, about 15 miles from Fresno. (R. 152.) He retains title until the goods are paid for and often the goods arrive at their destination outside the state before the payment is made. (R. 143.) In most cases appellee receives shipping instructions after the contract is made, the contracts themselves not stating where the goods are to be shipped to. In some instances, however, the shipping instructions come with the order. (R. 157, 163.)

Appellee testified that there were not available sufficient of the 30% free tonnage raisins to enable him to fill his contracts. (R. 78.) That was because there was no money yet available under the prorate program and the growers were therefore not inclined to sell or deliver to the prorate. (R. 87-90.) The program called for payment by the prorate to the grower on delivery. (R. 18.) The grower could not dispose of his 30% "free tonnage" until 70% of his crop was delivered to the prorate. (R. 19.) There was a hold-over of 70,000 tons of 1939 crop raisins, but these were likewise unavailable to appellee because they were in the hands of other packers who would not sell to appellee at the sweat-box price of three cents per pound, but would sell only at the packed raisin price of four cents per pound. (R. 100.) The prorate did not permit the sale of raisins in the 50% stabilization pool until January 1, 1941 (Plaintiff's Exhibit

7, R. 75), whereas appellee's contracts required delivery by him from October to December, 1940. (Plaintiff's Exhibits 1-4, 6, 8, 9, R. 72-76.) The raisins in the 20% surplus pool were likewise unavailable to appellee because the program directed that they be kept out of normal marketing channels. (R. 55.)

Appellee submits, therefore, that appellants have directly obstructed appellee's interstate business.

(c) THE PACKER HAS NO PART IN THE PRODUCTION OF RAISINS.

The trial court found (R. 57):

> "That the producer or farmer makes sun-dried raisins by placing the harvested bunches of ripe grapes upon trays laid upon the ground in the vineyard in such a way that the grapes are dried into raisins by the direct rays of the sun; that during the drying period the farmer turns the bunches of the grapes on the trays so that all sides of the grapes are exposed to the sun, thus securing a uniformity in drying; that when the grapes are properly dried, they are placed in 'sweat' boxes where the moisture retained in the dried grapes automatically equalizes toward the right proportions, completing the curing of the grapes into raisins. Such process is entirely accomplished on the premises where the grapes are grown, and when properly done, the grapes have been entirely dried and cured and are a wholesome food and sound article of commerce. They are then substantially ready for market as raisins. The process of cleaning, stemming, cap-

stemming, seeding (muscats only), grading, sorting and packaging in various sized containers, which is not uniform in packing plants, tends to make the raisins more desirable commercially and thus create a greater demand for them in the market, but is not essential to production."

Judge Yankwich, in his dissenting opinion, on the other hand, states that raisins are unfit for human consumption until the packer processes them. (R. 51.)

The cleaning, stemming, grading, sorting and packaging of raisins by the packers is performed in varying ways. In the large packing plants many operations are performed which are not duplicated in other plants (R. 115), and the operation takes approximately eight to ten minutes. (R. 107.) In the smaller plants half minute to a minute suffices. (R. 130.)

That the operation performed by the packer in no way changes the nature of the product is illustrated by the testimony of Mr. E. L. Chaddock as follows (R. 125-130):

"A. Well, perhaps it would save the court's time if I would describe, as nearly as I can, the processing in the early days, or the packing of raisins in the early days, and how it has changed down to the present time.

* * * * * * *

A. The process of stemming raisins was simply to dump them into a hopper; they went through a rapidly revolving cylinder against a concave, a wire which knocked off the stems. Then they were graded, in those days, the Muscats into four grades, as described yesterday by Mr.

Hines, and they went immediately into the box, which was nailed up, and loaded onto cars. That was the entire process.

* * * * * * *

Q. At that time was there any cleaning or washing or anything of that sort?

A. No, there wasn't.

Q. Was there any sugar test or anything of that sort?

A. None.

Q. Was there any fumigating?

A. None.

Q. When was the first fumigating brought into the industry?

A. Well, I think, in a general way, it wasn't until possibly ten or twelve years ago. Possibly I am off a year or two or three, one way or the other, on that.

Q. Are you familiar with what is known as the dried pack of the American Seedless Raisin Company?

A. Yes.

Q. Just describe to the court that product.

A. * * * their process was to simply dump the raisins into the hoppers. I have described; they went through the stemmer and the cone and cap stemmer, and then went directly into the 25 pound boxes; or in case they were put in cartons they were simply put in the cartons by hand—dumped in by hand, without any processing whatever or any washing or any cleaning, except what the cap stemmer did, which was supposed to knock off the sand or any dirt on a properly cured raisin, on a standard raisin, and they went into the carton ungraded, ungraded as to size, where today we have them graded in Fancy,

Choice, and Midget Thompson; but in those days they were ungraded.

* * * * * * *

Q. Mr. Chaddock, with respect to the merits of the raisins that have gone through this very minute detail or preparation and the raisins sent out in the dry pack, which has the superior quality?

A. I would say the dry pack.

* * * * * * *

A. It keeps better. A standard raisin, which is properly cured needs no processing whatever, in the true sense of processing. And when you wash a raisin, or any process that is put into a raisin, that has a deteriorating effect on that raisin, rather than a beneficial effect, for this reason: A raisin has a natural protective covering—now, that is somewhat technical—it has a natural protective coating called the bloom on the raisins; I imagine sort of an oil protective coating, a natural raisin oil, which protects the raisin and closes the pores. When you wash that bloom off and wash that protective coating off with water you have opened up the pores of the raisin, allowing the oxygen to get into the interior of it, and inside of 30 to 60 days that raisin begins to deteriorate. Many times if they use a little too much water it causes a crystallization of the raisin, which is very objectionable to the consumer and to the trade. And frequently a raisin which has been washed is apt to ferment; sometimes they will sour; but the keeping quality is very much reduced. A natural raisin on the stem will keep, if it is properly cured, from two to three years; and sometimes it is very difficult to tell an old crop of raisins from a new crop of

raisins; but where you wash them it reduces that keeping quality.

* * * * * * *

Q. Would you mind describing very briefly that used by packers like Mr. Brown?

A. I have been in Mr. Brown's plant. All he does is take the raisins off the wagon, put them onto a four-wheeled truck, wheel them over to the hopper of the stemmer, they whiz through the stemmer and cap stemmer, of which one of them is a cylinder, a rapidly revolving cylinder against a concave that sets about an inch from the cylinder, which knocks off the stems. There is a fan that blows the stems out; then they go into the second recleaner or rotating cylinder and that knocks off the little bit of a cap stem, which in some cases is left on; then they go directly into a 25-pound box, which is nailed up if it is a wooden case, or in a fibre case which is glued and immediately trucked over into the cars. That is the operation.

Q. Does he put them through a grading process?

A. Yes. Sometimes he grades them and sometimes he doesn't. It is according to how his orders come in. Frequently they are ordered out ungraded. Sometimes they are ordered graded.

* * * * * * *

Q. Mr. Chaddock, you are familiar with the matter of handling layer Muscats, are you?

A. Yes.

Q. Just how are they handled?

A. They are brought in from the farmer usually today; he has what is known as trays. The grower dumps three or four trays into a box, then lays a sheet of paper in there and dumps three or four more trays in until the box

is full. Those raisins are supposed to stand in the field and equalize as to their moisture content. Some bunches will have some under-cured berries and some over-cured berries on the bunch; and the proper method of the grower—it is if he is a careful grower—is to let those raisins stand for some weeks so that the moisture of the big berries will absorb into the dry berries and into the stem, so as to make the stem pliable so it can be handled. If this is not done the stems are very brittle, and you almost look at them cross-eyed and they will fall off the stem.

Q. When they get into the hands of the packer how does he handle them?

A. He simply places that sweatbox before a 20-pound box and lifts the raisins out of the sweatbox and places them into the 20-pound box.

Q. Do they ever steam them or do anything to make the stems less brittle?

A. Yes, they do; if the raisin is not properly cured they do. They are sometimes forced to do that by improper curing or improper sweating of the raisin by the grower. If the grower holds his raisins back until they are properly cured, they are not steamed, or no process whatever."

Mr. Chaddock also testified (R. 134):

"A. Under the change in the system of packing with the new Philadelphia recleaner, they had a tendency to gum up, and you can't operate the Philadelphia cleaner today without the use of water. That is the primary reason for using water. It isn't to wash the raisin. A properly cured raisin, a standard raisin needs no washing. It has been used for years and years without washing."

The program itself refers to the grower as the "producer". (R. 18.)

It is apparent that the packer in no way changes the nature of the raisin. Aside from packaging and sometimes fumigating the goods, he does nothing to them which the housewife cannot do in her own kitchen. It is a matter of common knowledge that the finest raisin is one picked off the tray in the field and eaten on the spot.

However, even if it could be said that the packer has a part in the production of the raisin, we submit that that would have no effect on this case, for the program does not purport to regulate what the packer does to the raisin, it simply obstructs his purchasing the raisin in the open market.

(d) HOW THE RAISIN PRORATE PROGRAM OPERATES.

The portions of the Agricultural Prorate Act (page 754, Statutes of 1933, as amended, Deering's General Laws, Act 143a), which are most material in the consideration of the prorate program, are Sections 19.1 and 20. Section 19.1 reads in part as follows:

> "The program committee for the purpose of minimizing the effect of surpluses or other adverse market conditions may be empowered in any program in any one or more of the following particulars:
>
> (a) Operation of pools. To establish and maintain either surplus or stabilizing pools, or both, which pools shall be authorized to receive

from each producer from time to time his uncertificated portions of the prorated commodity and market the same by grades for the account of the producer when it can be advantageously disposed of either in its original or converted state. The program committee shall designate the quantity that shall be placed in a stabilizing pool and the quantity that shall be placed in the surplus pool. In operating any such stabilizing or surplus pool, a program committee may fix grading, packing and servicing charges to be assessed against such commodities received by the pool or pools and requiring such handling. *The program committee shall have title to all such pools* and shall handle all commodities received by a pool and account for the same to the producers beneficially interested on a pooled basis. Each producer delivering his uncertificated tonnage to a pool shall be credited for his proportionate share of all tonnage so delivered."

Section 20 reads in part as follows:

"After any marketing program has been formulated and has been approved as provided in this act, the agent for the zone shall assume the administration of the program and any subsequent modification thereof and the issuance of proration certificates thereunder. Such certificates shall be divided into primary and secondary certificates. Each producer shall be entitled to one primary certificate which may indicate the quantities of the commodity, for which the program has been instituted which the producer named in such certificate shall be entitled to harvest or otherwise prepare for market and delivery into the primary channels of trade. Said primary

certificates may also indicate from time to time the number of secondary certificates theretofore issued under it. Secondary certificates shall be numbered consecutively and shall be used to control the time and volume of harvesting or other preparation for disposal. Such secondary certificates shall accompany all deliveries of the prorated commodity by producers into a primary trade channel."

"Primary Channel of Trade", is defined in Section 2 of the Act as follows:

"The phrase 'primary channel of trade' shall mean that transaction in which the producer or his cooperative marketing association loses physical possession of the commodity through the sale thereof or other disposition commercially."

The program which appellants seek to enforce does not purport to control the production or harvest of grapes. It deals only with the severed grape, dried and cured into raisins. It does not limit the acreage which may be cultivated or the quantity of grapes that any grower may pick or dry. The program is entitled: "*Marketing* Program for Raisins, as Amended", and is implemented by a "Seasonal *Marketing Program*". (R. 18.)

The program provides in substance (R. 18):

A. Each producer of 1940 crop raisins shall deliver 20% of his production of 1940 crop standard raisins into a surplus pool established by the Zone and 50% of his said 1940 crop production of standard raisins into a stabilization pool before receiving or being entitled to receive a sec-

ondary certificate authorizing sale and delivery to a handler of 30% of his 1940 crop raisin production, which 30% is the free tonnage of each producer.

B. No producer may sell or deliver to any handler any 1940 crop raisins until and unless he has fulfilled said surplus and stabilization requirements and has been issued a secondary certificate authorizing the sale and delivery of a stated tonnage (being the free tonnage) of his 1940 crop raisins.

C. No handler shall receive or process any 1940 crop free tonnage raisins unless said raisins at the time of delivery to him are accompanied by a secondary certificate authorizing the delivery of said raisins to a handler.

This shows that the program takes the raisin away from the producer by compulsion *after* the raisin has been harvested; and thereafter the producer has absolutely nothing to say as to how it shall be disposed of.

The program provides (Article V; R. 55):

"Sec. 4. *Disposal of Surplus Pool.* Pursuant to this Section 4, the Committee shall sell or authorize the sale of surplus pool raisins as soon as practicable after delivery of same to the Committee or to any agency authorized by the Committee to receive such raisins; *provided, however,* that none of the standard raisins in such pool shall be sold or otherwise disposed of prior to January 1 of the marketing season in which such pool is established. The sale of such raisins shall be made in accordance with the methods

and at the prices which in the judgment of the Committee or its authorized agency and the Director are the most advantageous to the producers of such raisins. The Committee shall make provision whereby a producer who delivers raisins to a surplus pool may, within the shortest time practicable, buy the same or an equivalent grade of raisins, subject to regulations to be established by said Committee.

Surplus pool raisins shall be sold only for assured by-product and other diversion purposes, and shall not be sold into normal marketing channels."

Thus, twenty per cent of the raisin crop is entirely withdrawn from the normal channels of interstate commerce.

The program further provides (Article VI; R. 55):

"Sec. 4. *Disposal of Stabilization Pool.* Pursuant to this Section 4 the Committee shall sell or authorize the sale of stabilization pool raisins as soon as practicable after delivery of same to the Committee, or to any agency authorized by the Committee to receive such raisins, in such manner as to maintain stability in the markets and to dispose of such raisins. The procedure relative to the disposition of such raisins and the provisions of the contract of sale shall be established by the Committee with the prior approval of the Director; *provided, however,* that all packers of record with the Program Committee shall be given uniform notice of offers to sell stabilization pool raisins and, if allocation of tonnage among packers becomes necessary, such allocation shall be made under uniform

rules, which are equitable as to all packers participating in offers to purchase, as formulated by the Committee and approved by the Director. The sale of such raisins shall be made in accordance with the methods and at the prices which in the judgment of the Committee or its authorized agency and the Director are the most advantageous to the producers of such raisins; *provided, however*, that no sales of raisins from a stabilization pool, other than such raisins which are subject to special loaning or pooling arrangements with the Federal Government, shall be made at less than the prevailing market price for raisins of the same variety and grade on the date of sale.

Stabilization pool raisins shall be sold only into normal marketing channels."

Under the foregoing section of the program, fifty per cent of the raisin crop may be withheld from interstate commerce and is allowed to leave the state only at such times, in such quantities, and at such prices as the program committee shall fix.

Thus, seventy per cent of the crop may be kept out of interstate and foreign commerce; and as to the remaining thirty per cent, it may be sold only after delivery of 70% of the crop to the prorate pools and payment of $2.50 per ton of the 30%. (R. 19.)

The foregoing shows that appellants assume complete control of this interstate industry and is attempting to enforce an embargo on the shipment of raisins.

ARGUMENT.

1. APPELLEE IS NOT ESTOPPED FROM ATTACKING CONSTITUTIONALITY OF THE RAISIN PRORATE PROGRAM.

A raisin prorate program was established for the year 1938 under the 1933 Prorate Act as amended in 1935. (Act 143, Deering's General Laws, California, 1937, p. 60.) At that time Brown was engaged in the growing and producing of raisins but was not a packer. In the year 1939 there wasn't any raisin prorate program. In 1939 Brown commenced operating as a packer of raisins and ever since has been both a grower, packer and shipper of raisins. The Agricultural Prorate Act was amended in many respects in 1939. (Deering's General Laws, Act 143, 1939, p. 993.) The last two sentences of paragraph 16 of the fact stipulation read (R. 20-21):

> "That the 1938 seasonal marketing program for raisins differed from the 1940 seasonal program in that the 1938 seasonal program did not have a stabilization pool requirement and had a 20% surplus pool, the same as the 1940 seasonal program."

The 1939 amendment made many changes in the Agricultural Prorate Act. Some new sections were added, and the more material alterations were:

1. The Agricultural Prorate Commission was abolished and an Advisory Commission created in its place. (Section 3.)

2. The administration of the act was taken away from the commission and given to the director. (Section 6; see, also, Sections 9, 22, and 23.)

3. The exercise of its powers by the program committee is made subject to the approval of the director. (Section 22.)

4. A large group of counties was excluded from grape prorafion. (Section 8.5.)

5. In 1937 when the first program was adopted, there was no provision whatever for a stabilization pool; the only pool authorized being a surplus pool. (Section 19.1.)

6. Whereas the original program was put into effect by the assent of 65% of the producers listed by the commission, the present program was put into effect as an amendment to the original program and this was done under the wholly novel method set up in Section 18.1 of the 1939 Act, whereby the program went into effect automatically, unless 40% of the producers listed by the commission cast a negative ballot.

7. Section 18 of the Act in 1937 gave the packers two members on the program committee. Section 15 of the law as it now stands denies the packers representation on the program committee unless the producer members of the committee request that the director appoint two packers. There are no packers on the present program committee.

As Brown had withdrawn from the program and refused to participate in the same in any manner in 1940, and as both the program and the law had been amended, he is not estopped from attacking the constitutionality of the Agricultural Prorate Act as implemented by the program.

In 16 *C. J. S.* 187 (Constitutional Law, Sec. 89), it is stated:

> "the fact that one complied with and favored the enforcement of an act prior to the passage of an amendment thereto, which amendment made a material change, does not estop him from asserting the unconstitutionality of the act as amended."

There are other equally strong reasons why appellants' claim of estoppel cannot prevail. The principle does not apply after one ceases to accept the benefits of a statute (or program). In *Southern Motor Ways, Inc. v. Perry,* 39 Fed. (2d) 145, the court said at page 148:

> "It has been urged that the complainant has applied for and obtained a certificate under the act and conducted business under it, and expressly agreed to regulation by the act and the commission, and is therefore estopped to attack the regulation. One cannot, in the same proceeding, both assail and rely upon a statute, nor can he deny its validity while clinging to benefits under it. But when he entirely repudiates it, although previously having endeavored to comply, and the statute is being used wholly to his present disadvantage, it may be assailed as unconstitutional. Buck v. Kuykendall, 267 U. S. 307, 45 S. Ct. 324, 69 L. Ed. 623, 38 A. L. R. 286. It would be unfortunate practically to have some of these carriers regulated through estoppel and others unregulated because of a successful attack upon the regulations."

One is not estopped to show the unconstitutionality of an act where his prior compliance thereto has

been under compulsion. *Hart Coal Corp. v. Sparks,* 7 F. Supp. 16, 19 (reversed on other grounds, 74 Fed. (2d) 697); *Union Bank v. Moore,* 204 Pac. 361 (Montana); *Abbie State Bank v. Bryan,* 282 U. S. 765, 75 L. Ed. 690, 34 Columbia Law Review 1495; *Union Pacific v. Public Service Commission,* 248 U. S. 67; *U. S. v. Seven Packages of Tea,* 126 Fed. 224.

An estoppel to show unconstitutionality, like any other estoppel, must be based upon prejudice to the other party resulting from the acts claimed to create the estoppel. *Ashwander v. T. V. A.,* 56 Sup. Ct. 466, 472; *Van Camp Sea Food Co. v. Newbert,* 76 Cal. App. 545, 554.

The weakness of appellants' claim of estoppel is illustrated by the fact that the point was not argued in the District Court. (R. 44.)

---

2. THE AGRICULTURAL PRORATE ACT AS IMPLEMENTED BY THE RAISIN PROGRAM VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES.

We shall first discuss the application of the commerce clause to the instant situation and, in that connection, we shall first call attention to certain decisions of the United States Supreme Court which hold that a state cannot prevent citizens from engaging in interstate commerce. In *West v. Kansas Natural Gas Company,* 221 U. S. 229, 31 Sup. Ct. 531, 55 Lawyers' Edition, 716, the facts were that the State of Oklahoma had passed a law forbidding the shipment of oil and gas from its wells into other states.

The Supreme Court of the United States, in disposing of the case, said:

> "A final decree was entered, declaring that the statute referred to 'is unreasonable, unconstitutional, invalid, and void, and of no force or effect whatever', and a perpetual injunction was awarded against its enforcement.
>
> The basis of the decree of the court was that expressed in its opinion ruling upon the demurrers; to wit, that the statute of Oklahoma was prohibitive of interstate commerce in natural gas, and in consequence was a violation of the commerce clause of the Constitution of the United States, and that being, as the court said, its dominant purpose, it would, if enforced against complainants 'invade their rights as guaranteed by the 14th Amendment of the National Constitution' and also the Constitution of the state. 172 Fed. 545.
>
> These conclusions are contested, and it is asserted that *the statute's 'ruling principle is conservation, not commerce;* that the due process clause is the single issue.' And due process, it is urged, is not violated, because the statute is not a taking of property, but a regulation of it under the police power of the state. The provisions of the act, it is further insisted, are but exercise of the police power to conserve the natural resources of the state, and as means to that end the right of eminent domain is forbidden to foreign corporations engaged in transporting gas from the state, and the use of the highways of the state confined to pipe lines operated by domestic corporations, in order that gas may be transmitted only between points within the state.

And such exercise of power, it is contended, does not regulate interstate commerce, but only affects it indirectly.'

A paradox is seemingly presented. Interstate commerce in natural gas is absolutely prevented,—prohibited, in effect, for we think it is undoubted that pipe lines are the only practical means of gas transportation, and to prohibit interstate commerce is more than to indirectly affect it. * * *

The statute presents no embarrassing questions of interpretation. It was manifestly enacted in the confident belief that the state had the power to confine commerce in natural gas between points within the state, and all of the rights conferred on domestic corporations, all of the rights denied to foreign corporations, were means to such end. And the state having such power, it is contended, if its exercise affects interstate commerce, it affects such commerce only incidentally. In other words, affects it only, as it is contended, by the exertion of lawful rights, and only because it cannot acquire the means for its exercise.

The appellant makes a broader contention. The right to conserve, or rather, the right to reserve, the resources of the state for the use of the inhabitants of the state, present and future, is broadly asserted. 'The ruling principle of the law,' counsel say, 'is conservation not commerce.' It is true the means adopted to secure conservation is more insistently brought forward than the right of conservation, and the power of the state over its corporations and over its highways and its right to give or withhold eminent domain is many times put forward in the argument and

illustrated by the citation of many cases. It cannot but be observed that these rights need not the support of one another. If the right of conservation be as complete as contended, for it could be secured by simple prohibitions or penalties. If the power over highways and eminent domain be as absolute as asserted, it will have to be given effect, no matter for what purpose exercised. We are therefore admonished at the very start in the discussion of the importance of the questions presented and the power which the states may exert against one another, even accepting the concession of appellant that Congress may break down the isolation by granting the right not only to take private property, but to subject the highways of the state, against the consent of the state, to the uses of interstate commerce. With full appreciation of the importance of the questions involved, we pass to their consideration."

The court then distinguishes the cases that have to do with the conservation of natural resources and states:

"The statute of Indiana was directed against waste of the gas, and was sustained because it protected the use of all the surface owners against the waste of any. The statute was one of true conservation, securing the rights of property, not impairing them. Its purpose was to secure to the common owners of the gas a proportionate acquisition of it,—a reduction to possession and property,—*not to take away any right of use or disposition after it had thus become property.* It was sustained because such was its purpose; and we said that the surface owners of the soil,

owners of the gas as well, could not be deprived of the right to reduce it to possession without the taking of private property. *It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it when in possession.*

The Oklahoma statute far transcends the Indiana statute. It does what this court took pains to show that the Indiana statute did not do. It does not protect the rights of all surface owners against the abuses of any. *It does not alone regulate the right of the reduction to possession of the gas, but, when the right is exercised, when the gas becomes property, takes from it the attributes of property,—the right to dispose of it: indeed, selects its market,* to reserve it for future purchasers and use within the state, on the ground that the welfare of the state will thereby be subserved. The results of the contention repel its acceptance. *Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and, when reduced to possession, is his individual property, subject to sale by him, and may be a subject of intrastate commerce and interstate commerce.* The statute of Oklahoma recognizes it to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial,—the business welfare of the state, as coal might be, or timber. Both of those products may be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine

them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that 'in matters of foreign and interstate commerce there are no state lines.' In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court.

The case of State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co., 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778, is pertinent here. A statute of Indiana was considered which made it unlawful to pipe or conduct gas from any point within the state to any point or place without the state. It was assailed on one side as a regulation of interstate commerce, and therefore void under the Constitution of the United States. It was defended, on the

other hand, as a provision for the exercise of the right of eminent domain, confining it to those engaged in state business, denying it to those engaged in interstate business; and, further, as imposing restrictions on foreign corporations. It will be observed, therefore, the statute had, it may be assumed, the same inducement as the Oklahoma statute, and the same special justifications were urged in its defense. The court rejected the defenses, and decided that the statute was not a legitimate exercise of the police power, or the regulation of the right of eminent domain or of foreign corporations, but had the purpose 'plainly and unmistakably manifested' to prohibit transportation of natural gas beyond the limits of the state; and that, this being its purpose, it was void as a regulation of interstate commerce. These propositions were announced: (1) Natural gas is as much a commodity as iron ore, coal, or petroleum or other products of the earth, and can be transported, bought, and sold as other products. (2) It is not a commercial product when it is in the earth, but becomes so when brought to the surface and placed in pipes for transportation. (3) If it can be kept within the state after it has become a commercial product, so may corn, wheat, lead, and iron. If laws can be enacted to prevent its transportation, 'a complete annihilation of interstate commerce might result.' And the court concluded: 'We can find no tenable ground upon which the act can be sustained, and we are compelled to adjudge it invalid.' The case was explicitly affirmed in Manufacturers' Gas & Oil Co. v. Indiana Natural Gas & Oil Co., 155 Ind. 545, 53 L. R. A. 134, 58 N. E. 706, 21 Mor. Min. Rep. 102."

On page 728, the court states:

"There is here and there a suggestion that the state not having granted such right, the alternative is a grant of it by Congress. But this overlooks the affirmative force of the interstate commerce clause of the Constitution. The inaction of Congress is a declaration of freedom from state interference with the transportation of articles of legitimate interstate commerce, and this has been the answer of the courts to contentions like those made in the case at bar. State ex rel. Corwin v. Indiana & O. Oil, Gas & Min. Co., 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; Benedict v. Columbus Constr. Co., 49 N. J. Eq. 23, 23 Atl. 485, and also in Haskell v. Cowham (April 7, 1911), United States circuit court of appeals, eighth circuit. In the latter case the Oklahoma statute was under review, and in response to the same contentions which are here presented, these propositions were announced, with citation of cases:

'No state by the exercise of, or by the refusal to exercise, any or all of its powers, may prevent or unreasonably burden interstate commerce within its borders in any *sound article thereof*.

'No state by the exercise of, or by the refusal to exercise, any or all of its powers, may substantially discriminate against or directly regulate interstate commerce or the right to carry it on.' * * * *

We place our decision on the character and purpose of the Oklahoma statute. The state, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate trans-

portation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the state to make. As said by the circuit court of appeals in the eighth circuit, no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate, interstate commerce or the right to carry it on. And in all of these inhibited particulars the statute of Oklahoma offends."

(Emphasis and italics throughout are those of the writer of the brief.)

In *Simpson v. Shepard*, 230 U. S. 352, 33 Supreme Court 729, 57 Lawyer's Edition 1511, the court said:

"If a state enactment imposes a direct burden upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which, in the absence of federal regulation should be free. (57 Law Ed., p. 1540.)

The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority. It has repeatedly been declared by this court that

as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive. In other matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation. (Citing cases.)

The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislative constitutionality ordains. (57 Law Ed., p. 1541.)"

The opinion then cites decisions holding that

"the states cannot tax interstate commerce, either by *laying the tax upon the business* which constitutes such commerce or the privilege of engaging in it, *or upon the receipts*, as such, derived from it; or upon persons or property in transit in interstate commerce; that they have no power to prohibit interstate trade in legitimate articles of commerce (citing cases), or to discriminate against the products of other states (citing cases); or to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on (citing cases); or to prescribe the rates to be charged for transportation from one state to another, or to subject the operations

of carriers in the course of such transportation to requirements that are unreasonable or pass beyond the bounds of equitable local protection." (Citing cases.)

"But within these limitations there necessarily remains to the states until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending federal intervention. Thus, there are *certain subjects* having the most *obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress,* have been controlled by state legislation from the foundation of the government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, *it is competent for a state to govern its internal commerce,* to provide *local improvements, to create and regulate local facilities, to adopt protective measures* of a reasonable character in the interest of the health, safety, morals and welfare of its people, *although interstate commerce may be incidentally or indirectly involved.* Our system of government is a practical adjustment by which the national authority as conferred by the Constitution is maintained in its full scope without

unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power. In such case, Congress must be the judge of the necessity of federal action. *Its paramount authority always enables it to intervene at its discretion* for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, *to displace local laws by substituting laws of its own.* The successful working of our constitutional system has thus been made possible. (57 Law. Ed., p. 1543.)"

In the case of *Lemke v. Farmers Grain Company,* 258 U. S. 50, 66 Lawyers' Edition 458, the court was dealing with an act of the legislature of the state of North Dakota and stated:

"The record discloses that North Dakota is a great grain-growing state, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota, to be shipped to and sold at terminal markets in other states, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota, for the grain purchased by complainant.

The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment, and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the state of North Dakota. * * *

The market for grain bought at Embden is outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the state. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal law.

That such course of dealing constitutes interstate commerce, there can be no question. * * *

Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and Federal authority under facts presented, which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of Federal control. Cases of that type are not in conflict with principles recognized as controlling here. *None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines.* It is true, as appellants contend, that after

the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. *The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transaction.* Swift & Co. v. United States, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276; Eureka Pipe Line Co. v. Hallanan, decided by this court December 12, 1921 (257 U. S. 265, ante, 227, 42 Sup. Ct. Rep. 101); and United Fuel Gas Co. v. Hallanan, decided the same day (257 U. S. 277, ante, 234, 42 Sup. Ct. Rep. 105) * * * (p. 462).

This act shows a comprehensive scheme to regulate the buying of grain. Such purchases can only be made by those who hold licenses from the state, pay state charges for the same, and act under a system of grading, inspecting, and weighing fully defined in the act. *Furthermore, the grain can only be purchased subject to the power of the state grain inspector to determine the margin of profit which the buyer shall realize upon his purchase.* * * *

That this is a regulation of interstate commerce is obvious from its mere statement.

Nor will it do to say that the state law acts before the interstate transaction begins. It seizes upon the grain and controls its purchase at the beginning of interstate commerce. Pennsylvania R. Co. v. Clark Bros. Coal Min. Co., 238 U. S.

456, 468, 59 L. Ed. 1406, 1411, 35 Sup. Ct. Rep. 896.

It is contended that these regulations may stand upon the principles recognized in decisions of this court which permit the state to make local laws under its police power, in the interest of the welfare of its people, which are valid, although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the states.

This principle has no application where the state passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by imposing burdens upon it. This court stated the principle and its limitations in the discussion of the subject in the Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. * * *

Applying the principle here, the statute denies the privilege of engaging in interstate commerce except to dealers licensed by state authority, and provides a system which enables state officials to fix the profit which may be made in dealing with a subject of interstate commerce. (pp. 463-4.)

It is alleged that such legislation is in the interest of the grain growers, and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce, if legislation of that character is needed. The supposed inconvenience and wrongs are not to be redressed by sustaining the

constitutionality of laws which clearly encroach upon the field of interstate commerce, placed by the Constitution under Federal control. * * * (p. 465.)"

The court, of course, will bear in mind that the raisin prorate program does not relate to the cultivation, growing or harvesting of grapes. It is first applied to the raisin, which is the severed, dried and cured grape. It then attempts to seize upon and take title to the raisin and to deprive the owner of the power to sell or dispose of the same in interstate commerce or for interstate commerce.

In *Shafer v. Farmers' Grain Company of Embden*, 268 U. S. 189, 45 Supreme Court Reporter, 481, the court said:

"A prior statute, concededly 'having the same general purpose,' was adopted by the State Legislature in 1919 (Laws 1919, c. 138) and held invalid by this court in Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458, as an interference with interstate commerce. There are differences between that statute and the present one, of which the parties take divergent views. It would serve no purpose to take up these differences in detail. We shall describe the situation to which the present act is intended to apply, state its material provisions, and then come to its operation on interstate commerce.

Wheat is the chief product of the farms of North Dakota, the annual crop approximating 150,000,000 bushels. About 10 per cent is used and consumed locally, and about 90 per cent is sold within the state to buyers who purchase for

shipment, and ship, to terminal markets outside the state. Most of the sales are made at country elevators to which the farmers haul the grain when harvested and threshed. These elevators are maintained and operated by the buyers as facilities for receiving the grain from the farmers' wagons and loading it into railroad cars. The loading usually proceeds as rapidly as grain of any grade is accumulated in carload lots and cars can be obtained. When a car is loaded it is sent promptly to a terminal market and the grain is there sold. This is the usual and recognized course of buying and shipment. Occasionally a farmer has his grain stored in the country elevator, or shipped to a terminal elevator for storage, and awaits a possible increase in price; but even in such instances he usually sells to the buyer operating the country elevator, and the latter then sends the grain to the terminal market, if it has not already gone there. * * *

The North Dakota act in terms covers all farm products, but as it is chiefly aimed at dealings in wheat, and the parties have discussed it on that basis, our statement of its provisions will be shortened by treating them as if relating only to wheat.

The title to the act describes it as one whereby the state undertakes (a) 'to supervise and regulate the marketing' of wheat; (b) to prevent 'unjust discrimination, fraud and extortion in the marketing' of such grain; and (c) to establish 'a system of grading, weighing, and measuring' it. The first section declares the purpose of the state to encourage, promote, and safeguard the production of wheat and commerce therein by

establishing a uniform system of grades, weights, and measures. The second and third sections provide for a state supervisor of grades, weights, and measures, and give him authority to make and enforce necessary orders, rules, and regulations to carry out the provisions of the act. * * *

The eighth section requires every buyer operating an elevator to obtain from the supervisor a yearly license, the fee for which is to be adjusted by the supervisor to the capacity of the elevator as not exceeding $1 for each 1,000 bushels. The ninth section requires every elevator operator or individual 'buying or shipping for profit,' who does not pay cash in advance, to file with the supervisor a sufficient bond, running to the state, to secure payment for all wheat bought on credit. * * *

Buying for shipment, and shipping to markets in other states, when conducted as before shown, constitutes interstate commerce; the buying being as much a part of it as the shipping. We so held in Lemke v. Farmers' Grain Co., supra, following and applying the principle of prior cases. Later cases have given effect to the same principle. Stafford v. Wallace, 258 U. S. 495, 516, 42 S. Ct. 397, 66 L. Ed. 735, 23 A. L. R. 229; Binderup v. Pathe Exchange, 263 U. S. 291, 309, 44 S. Ct. 96, 68 L. Ed. 308.

Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which

is committed to Congress and denied to the states by the commerce clause of the Constitution. * * *

In our opinion the North Dakota act falls certainly within the second of the two rules just stated. By it that state attempts to exercise a large measure of control over *all wheat buying* within her limits. About 90 per cent of the buying is in interstate commerce. Through this buying and the shipping in connection with which it is conducted the wheat which North Dakota produces in excess of local needs—more than 125,000,000 bushels a year—finds a market and is made available for consumption in other states where the local needs greatly exceed the production. Obviously therefore the control of this buying is of concern to the people of other states as well as those of North Dakota. * * *

We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the state to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the commerce clause.

The defendants make the contention that we should assume the existence of evils justifying the people of the state in adopting the act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the states that are affected. * * *

For the reasons here given we hold that the act is a direct regulation of the buying of grain in interstate commerce, and therefore invalid, and that the District Court rightly granted the injunction."

In *Grandin Farmers' Co-op. Elevator Co. v. Langer*, 5 Fed. Supp. 425 (affirmed without opinion in 292 U. S. 605, 78 Lawyers' Edition, 1467), the court said:

"The complainants are the owners and operators of grain elevators located in the state of North Dakota, and their business consists of the buying, selling, storing, and shipping of the grain at such elevators with the intent and purpose of causing such grain to be transported to terminal markets situated outside of the state. That they are engaged in interstate commerce is virtually conceded, as it, of course, must be in view of the decisions of the Supreme Court of the United States in Lemke v. Farmers' Grain Co., 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458, and Shafer v. Farmers' Grain Co., 268 U. S. 189, 45 S. Ct. 481, 69 L. Ed. 909. In the latter case that court said (page 198 of 268 U. S., 45 S. Ct. 481, 485, 69 L. Ed. 909):

'Buying for shipment, and shipping, to markets in other states, when conducted as before shown, constitutes interstate commerce; the buying being as much a part of it as the shipping.'

The defendants are the Governor of the state and the board of railroad commissioners. Chapter 1 of the Laws of North Dakota for 1933 authorizes the Governor to 'declare and maintain an embargo on the shipment out of this state of any agricultural product produced within the state,

when the market price thereof reaches a point where the returns are confiscatory'; the Legislature declaring that 'agricultural products taken from the soil constitute a drain on the natural resources of this state, and that the disposition thereof at confiscatory prices becomes a matter of public concern warranting an executive order to prevent the same'. Pursuant to the authority assumed to have been conferred upon him under this act, the Governor has declared and is seeking to maintain an embargo upon the shipment of grain out of North Dakota."

The court discusses jurisdiction and continues:

"Since the act of the Legislature and the proclamations of the Governor under it, against the enforcement of which the injunction is sought, appear to be in direct conflict with the commerce clause of the Constitution, it is unnecessary for us to consider whether they are in violation of other constitutional provisions.

The state has no power to interfere directly with interstate commerce, regardless of economic conditions. The regulation of such commerce is a matter of national concern. While in certain respects this country is an aggregation of independent states, it is, as respects interstate and foreign commerce, a nation. This must necessarily be true, since people living in many of our great centers of population are utterly dependent not only for their livelihood but for their lives upon an uninterrupted flow of food, fuel, and clothing in interstate commerce. If one state or all the states could place embargoes upon the export of the products of their mines, forests, fields, and oil wells, an inconceivable condition of national insecurity

would follow. This is pointed out in Oklahoma v. Kansas Natural Gas Co., 221 U. S. 229, page 255, 31 S. Ct. 564, 571, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, in which the court, speaking of the power of the states to lay embargoes, said:

> 'If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle? Thus enlarged, or without that enlargement, its influence on interstate commerce need not be pointed out. To what consequences does such power tend? If one state has it, all states have it; embargo may be retaliated by embargo, and commerce will be halted at state lines. And yet we have said that "in matters of foreign and interstate commerce there are no state lines". In such commerce, instead of the states, a new power appears and a new welfare,—a welfare which transcends that of any state. But rather let us say it is constituted of the welfare of all of the states, and that of each state is made the greater by a division of its resources, natural and created, with every other state, and those of every other state with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward, it must be done by the authority of another instrumentality than a court.'

In Shafer v. Farmers' Grain Co., supra, the court said (page 198 of 268 U. S., 45 S. Ct. 481, 485, 69 L. Ed. 909):

'Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nationwide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution.'

A state statute which, by its necessary operation, directly interferes with or burdens interstate commerce is a prohibitive regulation and invalid, regardless of the purpose for which it was enacted. Etc.

The same contention which is made here as to the right of the state to make local laws under its police power which are valid although affecting interstate commerce was made in the case of Lemke v. Farmers' Grain Co., supra, 258 U. S. 50, 42 S. Ct. 244, 66 L. Ed. 458. The court said (page 58 of 258 U. S., 42 S. Ct. 244, 247, 66 L. Ed. 458):

'It is contended that these regulations may stand upon the principles recognized in decisions of this court which permit the State to make local laws under its police power in the interest of the welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States. This principle has no application where the State passes beyond the exercise of its legitimate authority, and undertakes to regulate interstate commerce by imposing burdens upon it.

This court stated the principle and its limitations in the discussion of the subject in the Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. In the course of the opinion in that case, we said (230 U. S. p. 400, 33 S. Ct. 729, 740, 57 L. Ed. 1511, 48 L. R. A. (N. S. 1151, Ann. Cas. 1916A, 18):

"The principle, which determines this classification (between federal and state power), underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."

We find no help for the defendants in People v. Nebbia, 262 N. Y. 259, 186 N. E. 694, the so-called New York Milk Case. That case related to the right of the Legislature of the state of New York to regulate the wholesale and retail prices for milk handled within the state for consumption. The legislation was attacked on the ground that it interfered with contract and property rights; the commerce clause of the Federal Constitution was in no way involved."

Concluding, the court said:

"The New York Milk Case and the Minnesota Moratorium Case both represent asserted conflicts between the rights of the state, under its police

power, to legislate for the general welfare of its people, and the rights of individuals in their contracts or property under the Constitution. This case, as we view it, is not primarily a conflict between the police power of the state and the rights of individuals, but a conflict between the power of the state and the power of the United States with respect to a subject with which, under the Constitution, Congress alone has a right to deal.

Our conclusion is that the act of the Legislature and the proclamations of the Governor under it are void."

In *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1, 49 S. Ct. 1, the State of Louisiana had passed an act permitting the gathering of shrimp and permitting its sale in interstate commerce. It, however, passed an act forbidding the shipment in interstate commerce all such shrimp unless the heads and hulls were removed. The plaintiff brought an action to enjoin the enforcement of the statute on the ground that it was unconstitutional, alleging that the saving of the head and hull was a pretext and that it was of no value to the people of the State of Louisiana, and that the real purpose of the limitation was to force the packing plants of other states to move into Louisiana to pack the shrimp. The District Court denied a preliminary injunction. On appeal to the Supreme Court of the United States a preliminary injunction was issued, and in passing on the act the court said:

"In determining what is interstate commerce, courts look to practical considerations and the established course of business. Swift & Co. v.

United States, 196 U. S. 375, 398, 49 L. ed. 518, 525, 25 Sup. Ct. Rep. 276; Lemke v. Farmers Grain Co., 258 U. S. 50, 59, 66 L. ed. 458, 464, 42 Sup. Ct. Rep. 244; Binderup v. Pathe Exch., 263 U. S. 291, 309, 68 L. ed. 308, 316, 44 Sup. Ct. Rep. 96; Shafer v. Farmers Grain Co., 268 U. S. 189, 198, 200, 69 L. ed. 909, 914, 915, 45 Sup. Ct. Rep. 481. Interstate commerce includes more than transportation; it embraces all the component parts of commercial intercourse among states. And a state statute that operates directly to burden any of its essential elements is invalid. Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 290, 66 L. ed. 239, 243, 42 Sup. Ct. Rep. 106; Shafer v. Farmers Grain Co., supra, 199 (69 L. ed. 914, 45 Sup. Ct. Rep. 481). A state is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the state. Pennsylvania v. West Virginia, 262 U. S. 553, 596, 67 L. ed. 1117, 1132, 32 A. L. R. 300, 43 Sup. Ct. Rep. 658; West v. Kansas Natural Gas Co., 221 U. S. 229, 255, 55 L. ed. 716, 726, 35 L. R. A. (N. S.) 1193, 31 Sup. Ct. Rep. 564. * * * Consistently with the act, all may be, and in fact nearly all is, caught for transportation and sale in interstate commerce. As to such shrimp, the protection of the commerce clause attaches at the time of the taking. Dahnke-Walker Mill Co. v. Bondurant, supra. Pennsylvania v. West Virginia, supra, 596 et seq. (67 L. ed. 1132; 32 A. L. R. 300, 43 Sup. Ct. Rep. 658)."

3. DECISIONS UNDER FEDERAL STATUTES.

Congress has enacted a statute, known as AAA, which is almost identical in phraseology and in purpose with the Agricultural Prorate Act of California. Quotations from decisions under this act will be made, as they indicate the field which Congress considers properly within the terms of the commerce clause of the United States Constitution.

In *United States v. Edwards,* 16 Federal Supplement, 53, the United States District Court for the Southern District of California, sustained the legality of the AAA with respect to an orange and grapefruit district established in Southern California. The AAA was held properly enacted under the commerce clause. This case was appealed by the defendant and was finally disposed of in *United States v. Edwards,* 91 Federal (2d) 767, wherein the Ninth Circuit Court of Appeals stated that ninety percent of the oranges produced in California moved in interstate and foreign commerce. The court said that it would take judicial notice that the citrus orchard industry has its beginning as an article of interstate commerce even to the planting of the trees. On page 780, it states:

> "Under the decision in National Labor Relations Board v. Jones & Laughlin Steel Corporation, 57 S. Ct. 615, 81 L. Ed. ....., 108 A. L. R. 1352, overruling Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160, Congress may directly regulate production of commodities to be shipped in interstate commerce. Hence it could directly regulate the planting and manage-

ment of citrus orchards and marketing of fruit within a state under the profit motive of the sale of the major portion of the fruit to consumers in other states.

Since the greater includes the less, the Agricultural Adjustment Act may, as an incident to regulating the flow of oranges to be shipped out of California and Arizona, affect the price both of the lesser amount shipped out and the greater amount remaining in those states.

In a like way the act may affect the planting, maintenance or abandonment of citrus groves."

The court makes an extensive review and quotation from *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 57 Supreme Court 615, and concludes that the Federal Congress had plenary power to enact the AAA under the commerce clause. The decision is quite long and comprehensive and the court will probably desire to read the whole of the case.

In *Currin v. Wallace,* 306 U. S. 1, 59 Supreme Court 379, *January 30, 1939,* the court had for consideration the power of Congress to enact the Tobacco Inspection Act. The constitutionality was challenged on the ground that it was not within the scope of the commerce clause of the Federal Constitution. The plaintiffs were warehousemen, operating in North Carolina, and sought to enjoin the enforcement of the Act. The Act was put into effect in North Carolina, in a manner similar to the Prorate Act of California. Auction sales were had of tobacco. The buyers were mostly persons

transporting the tobacco in interstate commerce. At least sixty-five percent of all purchases on the warehouse floor were ultimately transported in interstate commerce. The court said:

> "The fact that the growers are not bound to accept bids, and in certain instances reject them, does not remove the auction from its immediate relation to the sales that are consummated upon the offers that the growers do accept. The auction in such cases is manifestly a part of the transaction of sale. So far as the sales are for shipment to other States or to foreign countries, it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation. *Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation.* Swift & Co. v. United States, 196 U. S. 375, 398, 399, 25 S. Ct. 276, 280, 49 L. Ed. 518 (other citations omitted).

There is no permissible constitutional theory which would apply this principle to purchases of livestock as in the Swift and Stafford Cases, and of grain as in the Lemke and Shafer Cases, and deny its application to tobacco. In the Lemke Case (supra, at pages 60, 61, 42 S. Ct. at page 248), condemning the effort of a State to control the buying of grain for shipment to other States, the Court referred to the power of Congress to provide its own regulation for such transactions, saying: 'It is alleged that such legislation is in the interest of the grain growers and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is

amply authorized to pass measures to protect interstate commerce if legislation of that character is needed.' And again, in the Shafer Case (supra, at pages 188, 199, 45 S. Ct. at page 485), the Court said: 'The right to buy it (grain) for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the states by the commerce clause of the Constitution.' * * *

Having this authority to regulate the sales on the tobacco market, Congress could prescribe the conditions under which the sales *should be made in order to give protection to sellers or purchasers or both.* Congress is not to be denied the exercise of its constitutional authority in prescribing regulations merely because these may have the quality of police regulations. It is on that principle that misbranding under the Food and Drugs Act embraces false or misleading statements as to the ingredients of commodities or the effects of their use. See Seven Cases v. United States, 239 U. S. 510, 36 S. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164. Inspection and the establishment of standards for commodities has been regarded from colonial days as appropriate to the regulation of trade, and the authority of the States to enact inspection laws is recognized by the Constitution. Art. 1, sec. 10, cl. 2, U. S. C. A. See Turner v. Maryland, 107 U. S. 38, 39, 51-54, 2 S. Ct. 44, 55, 27 L. Ed. 370; Pacific States Company v. White, 296 U. S. 176, 181, 56 S. Ct. 159, 161, 80 L. Ed. 138, 101 A. L. R. 853. *But the inspection laws of a State relating to exports or to articles purchased for shipment to other States are subject to the*

paramount regulatory power of Congress. Turner v. Maryland, supra, at pages 57, 58, 2 S. Ct. at page 60. And Congress has long exercised this authority in enacting laws for inspection and the establishment of standards in relation to various commodities involved in transactions in interstate or foreign commerce. The fact that the inspection and grading of the tobacco take place before the auction does not dissociate the former from the latter, but on the contrary it is obvious that the inspection and grading have immediate relation to the sales in interstate and foreign commerce which Congress thus undertakes to govern.

In Townsend v. Yeomans, 301 U. S. 441, 57 S. Ct. 842, 81 L. Ed. 1210, we recently had under consideration the legislation of Georgia prescribing maximum charges for the services of tobacco warehousemen who conducted their business in a manner similar to that prevailing in North Carolina. There, the warehousemen strongly insisted that they were engaged in interstate and foreign commerce, as the tobacco sold on their floors was destined for interstate or foreign shipment, and hence that the State was without power to fix their fees. They invoked the federal Act in support of their contention. But we found nothing in the federal Act which undertook to regulate the charges of warehousemen and hence we concluded that Congress had restricted its requirements and left the State free to deal with the matters not covered by the federal legislation and not inconsistent therewith. The authority of Congress to enact the Tobacco Inspection Act was not questioned."

In *Mulford v. Smith*, 307 U. S. 38, 59 Supreme Court, 648, *decided April 17, 1939*, the court had for consideration an attack upon the constitutionality of the AAA. This Act provided marketing quotas for tobacco, under a program set up involving tobacco. The apportionment of the quotas amongst the farmers was to be by local committees of farmers according to the standards prescribed in the Act. Each farmer was to be notified of his marketing quota; heavy penalties were imposed for excess marketing. Answering the attack of the appellants, the court said:

> "The appellants plant themselves upon three propositions: (1) that the Act is a statutory plan to control agricultural production and, therefore, beyond the powers delegated to Congress; (2) that the standard for calculating farm quotas is uncertain, vague, and indefinite, resulting in an unconstitutional delegation of legislative power to the Secretary; (3) that, as applied to appellants' 1938 crop, the Act takes their property without due process of law.
>
> First. The statute does not purport to control production. It sets no limit upon the acreage which may be planted or produced and imposes no penalty for the planting and producing of tobacco in excess of the marketing quota. It purports to be solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce,—the marketing warehouse. The record discloses that at least two-thirds of all flue-cured tobacco sold at auction warehouses is sold for immediate shipment to an interstate or foreign destination. In Georgia nearly one hundred per cent. of the

tobacco so sold is purchased by extrastate purchasers. In markets where tobacco is sold to both interstate and intrastate purchasers it is not known, when the grower places his tobacco on the warehouse floor for sale, whether it is destined for interstate or intrastate commerce. Regulation to be effective, must, and therefore may constitutionally, apply to all sales. This court has recently declared that sales of tobacco by growers through warehousemen to purchasers for removal outside the state constitute interstate commerce. Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrelevant to the validity of the legislation.

The provisions of the Act under review constitute a regulation of interstate and foreign commerce within the competency of Congress under the power delegated to it by the Constitution."

It is apparent that if the regulation of the flow of tobacco in interstate commerce is within the commerce clause of the Federal Constitution, the regulation of the flow of raisins into interstate commerce is also a matter within the control of Congress and not within the control of the State. In *Whittenburg* v.

United States, 100 Federal (2d), 520, *December 15, 1938,* the United States District and Circuit Court of Appeals had for consideration the validity of a program involving grapefruit put into effect in Texas under the AAA. The court held it was proper legislation under the interstate commerce clause. If it was a proper field in which Congress could legitimately legislate, it would seem to be obvious that the state could not legislate upon such matter, for the court there said:

> "If the economic end is to be reached by an interstate regulation of commerce, the Congress may, and must, devise the regulation."

In *United States v. Rock Royal Co-op.,* 59 Sup. Ct. 993-1010, 307 U. S. 533, decided June 5, 1939, the court referred to and followed the *Lemke* case and stated:

> "The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment, U. S. Const. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce."

The above case had to do with a pro rate program under the Triple A, relating to the dairying interests in one of the mid-western states.

In *Wallace v. Hudson-Duncan & Company,* Ninth Circuit Court of Appeals, 98 Federal (2d) 985, *de-*

cided September 20, 1938, the court had for consideration the validity of a walnut program established by the Secretary of Agriculture, covering the states of California, Oregon and Washington. The District Court held the program unconstitutional, but the Circuit Court of Appeals reversed the case, saying:

> *"Congress,* in the exercise of its police power in the field of interstate commerce, *may regulate intrastate commerce in walnuts, where, as here, such regulation bears a reasonable relation to the prevention of an economic evil in the interstate walnut trade.*
>
> In Edwards v. U. S., supra, we have gathered the cases establishing that the congressional police power regulating interstate commerce to attain the price parity sought by the Act is not prevented by the Constitution from the incidental regulation of intrastate activities. * * * In National Labor Relations Board v. Jones & Laughlin Steel Corp., the regulation of the labor dispute was in intrastate production before the products to be shipped even had been manufactured. It was the intention to ship them when thereafter fully manufactured which warranted the regulation of their intrastate production. The finding by the Court of the percentages of shipment of goods in interstate commerce, prior to the labor disputes, is relevant only to prove the intent so to ship the goods whose manufacture the dispute interfered with or prevented. * * * Certainly the regulation of intrastate rates and labor relations in intrastate production in these last two cases is no less than is the control provided for in the instant case. * * * The company contends that because some of the walnuts delivered to the

Board may remain within the state, say, by delivery to one of the state's charitable institutions, the regulation is of intrastate commerce for which there is no finding of fact for its necessity. This and all the other effects on intrastate commerce are merely incidental to the prevention of the interstate shipment of the surplus, adequately found by the Secretary to have its destructive effect on the desired price parity. Hence it could directly regulate the planting and management of citrus orchards and marketing of fruit within a state under the profit motive of the sale of the major portion of the fruit to consumers in other states."

Raisins are, undoubtedly, produced, cured and marketed as interstate commerce. The mere fact that a small percentage of such fruit may be consumed locally is immaterial. The state does not possess the power to withhold raisins from interstate commerce. The power to deny *sound* property access to interstate commerce is vested in Congress and not in the states. The court will bear in mind that the Agricultural Prorate Act and the program set up under the same does not attempt to improve the quality of raisins and grapes or grapevines. It is not an act under the police power to do away with disease or infected plants or fruits. It is a plant devised and being carried through for the sole object of regulating the flow and the price of raisins in interstate commerce.

4. BROADENING PHILOSOPHY OF THE POWER OF CONGRESS UNDER THE COMMERCE CLAUSE AS INDICATED BY LABOR DECISIONS.

In *National Labor Relations Board v. Carlisle Lumber Company,* 94 Federal (2d) 138, *decided in 1937,* the company owned forests and lumber mills. It did all of its logging and milling operations within the State of California, but ninety percent of its lumber found its consumption in interstate commerce. The question arose whether under the Wagner Labor Act, the Federal Government could enforce its provisions with respect to the men working not only in the mill but in the logging camps, and the court upheld the right, saying that the acts of the laborers in the logging camps would "affect commerce", and, for that reason, Congress had power to regulate such activities. In *National Labor Relations Board v. Jones & Laughlin Steel Corporation,* 301 U. S. 1, 57 Supreme Court, 615, *April 12, 1937,* the court was considering the power of the National Labor Relations Board to adjudge the defendant guilty of unfair labor practices. The defendant had its steel mills in Pittsburgh and Aliquippa, Pennsylvania. To these mills were brought coal, iron and supplies from other states. These supplies stayed at the mills varying lengths of time, from three to ten months, when they were converted into finished or semi-finished steel products. The Act gave Congress control over any acts "affecting commerce" and defined commerce as: "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several states * * *" and defined the term, "affecting commerce" as: "The term

'affecting commerce' means in commerce, or burdening or obstructing commerce, or the free flow of commerce, or having led, or tending to lead, to a labor dispute, burdening or obstructing commerce, or the free flow of commerce." In that case the raw products when subjected to manufacturing processes "are changed substantially as to character, utility and value." The court said (page 624):

> "We do not find it necessary to determine whether these features of defendant's business dispose of the asserted analogy to the 'stream of commerce' cases. The instances in which that metaphor has been used are but particular, and not exclusive, illustrations of the protective power which the government invokes in support of the present act. The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources. The fundamental principle is that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection or advancement'."

Again on page 625, the court says:

> "The close and intimate effect which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local. This has been abundantly illustrated in the application of the Federal Anti-Trust Act (15 U. S. C. A. paragraphs 1-7, 15

note). In the Standard Oil and American Tobacco Cases (Standard Oil Co. v. United States), 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; (United States v. American Tobacco Co.) 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663), that statute was applied to combinations of employers engaged in productive industry. Counsel for the offending corporations strongly urged that the Sherman Act had no application because the acts complained of were not acts of interstate or foreign commerce, nor direct and immediate in their effect on interstate or foreign commerce, but primarily affected manufacturing and not commerce. 221 U. S. 1, at page 5, 31 S. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; 221 U. S. 106, at page 125, 31 S. Ct. 632, 55 L. Ed. 663. Counsel relied upon the decision in United States v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249, 39 L. Ed. 325. The Court stated their contention as follows: 'That the act, even if the averments of the bill be true, cannot be constitutionally applied, because to do so would extend the power of Congress to subject *dehors* the reach of its authority to regulate commerce, by enabling that body to deal with mere questions of production of commodities within the states.' And the Court summarily dismissed the contention in these words: 'But all the structure upon which this argument proceeds is based upon the decision in United States v. E. C. Knight Co., 156 U. S. 1, 15 S. Ct. 249, 39 L. Ed. 325. The view, however, which the argument takes of that case, and the arguments based upon that view have been so repeatedly pressed upon this court in connection

with the interpretation and enforcement of the Anti-trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice.' (citing cases) 221 U. S. 1, at pages 68, 69, 31 S. Ct. 502, 519, 55 L. Ed. 619, 34 L. R. A. (N.S.) 834, Ann Cas. 1912D, 734.'

Upon the same principle, the Anti-Trust Act has been applied to the conduct of employees engaged in production. Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Coronado Coal Co. v. United Mine Workers, supra. * * *"

Again the court said:

"It is thus apparent that the fact that the employees here concerned were engaged in production is not determinative. The question remains as to the effect upon interstate commerce of the labor practice involved. * * *

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception."

Again the court said:

"And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!"

In *United States v. F. W. Darby Lumber Company, et al.*, 61 Supreme Court, 451, the court was considering the Fair Labor Standards Act, 29 U. S. C. A., paragraph 215(a), (1, 2 and 5), *February 3, 1941.* This act is drafted with a different approach to the commerce clause. It applies to goods "produced for interstate commerce" and attempts to set a minimum wage and maximum hours of employment in industries producing goods for interstate commerce while the National Labor Relations Act applies to labor "affecting interstate commerce." The case reviews the various decisions dealing with interstate commerce and overrules *Hammer v. Dagenhart*, 247 U. S. 251, 38 Supreme Court, 529. The court distinguishes the cases which merely affect interstate commerce like *Heisler v. Thomas Colliery Company*, 260 U. S. 245, and other taxing cases within the police power of the state, but which do not in anywise attempt to regulate interstate commerce. It is a most instructive case and indicates the final development of a wide and broadened philosophy as to the comprehensive nature of the commerce clause of the Federal Constitution.

---

5. LOCAL COURT DECISIONS.

Raisin Proration Zone No. 1 filed two actions against appellee and one against Sohn Singh, from whom he had purchased raisins, then the director of agriculture filed an action against appellee. All actions were in the Superior Court of the State of California, in and for the County of Fresno.

The first case came before Hon. Glenn L. Moran, Judge, who, in deciding the cause, referred to what is commonly known as the *Lemon Prorate case*, 35 Fed. Supp. 108, by Judge Stephens (Circuit Judge), and Hollzer and St. Sure (District Judges), and stated:

> "that the enforcement of the program of the plaintiff in this action, involving the raisin industry as it affects the defendant herein, as a producer and processor of raisins, constitutes as great and material a violation of this defendant's rights under the interstate commerce clause of the United States Constitution as the lemon program, covered by the above cited case, was of the plaintiff's rights therein; and
>
> IT IS THE CONCLUSION OF THIS COURT: That the opinion and decision of the court in the above cited cases, and with which this court concurs and agrees, is sound, logical and amply supported by many authorities and decisions, and should form the basis for this court's decision herein. * * *"

The second case came before Hon. H. Z. Austin, Judge, and the *Sohn Singh* case came before Hon. Ernest Klette, Judge, and the action by the director of agriculture came before Hon. H. Z. Austin, Judge. In each of the cases the Superior Court sustained a general demurrer to the complaint without leave to amend; apparently taking judicial knowledge of the character and nature of the raisin industry and its predominant feature as a part of interstate commerce.

These cases are now on appeal in the District Court of Appeal of the Fourth Appellate District, pending

on the ready to submit calendar, awaiting the decision of this cause by the Supreme Court.

CONCLUSION.

The raisin prorate program is an arbitrary attempt to control the price and flow of raisins into interstate commerce. It embargoes such sale and commerce as to 70% of all raisins produced by grower and packer alike. There isn't any possible outlet for 90% to 95% of all raisins produced in the zone except in interstate commerce. It is illogical to contend that to forbid sale and purchase for such purpose is not directly obstructing and interfering with interstate commerce.

The damage which the evidence shows appellee would suffer is in excess of $3000.00. This gives the court jurisdiction. The evidence further shows that 90% of Brown's sales were for interstate shipment, likewise his production and purchases were for a similar purpose. The decision of the District Court should be affirmed.

Dated, Fresno, California,
May 1, 1942.

Respectfully submitted,
CHRISTIAN M. OZIAS,
G. L. AYNESWORTH,
IRVINE P. ATEN,
RICHARD V. ATEN,
WILLIAM M. MILES,
Attorneys for Appellee.